FILED
APR 20 1953
HAROLD B. WILLEY, Clerk

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1952

No. 734

ESTATE OF MABEL COCHRAN, Deceased; SIDNEY ELMER COCHRAN and DONALD ROBERT COCHRAN, Executors, and JOSEPH E. COCHRAN,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

ELI FREED,
1069 Mills Building, San Francisco 4, California,
Attorney for Petitioners.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

Subject Index

	Page
Opinions below	2
Jurisdiction	2
Statutes involved	2
Questions presented	3
Statement	3
Reasons for granting writ	5
I. The decision below fails to fully accept the decision in Culbertson v. Commissioner, is in conflict with the Second and Fifth Circuits, and is contrary to the present position of the tax court	6
II. It was error to deny petitioners the right to petition for a rehearing in banc	8
The statute and practice	9
Conclusion	10

Table of Authorities Cited

Cases	Pages
Bridges et al. v. U. S. (9th Cir. 1952) 201 F. (2d) 254	9
Clarence B. Ford v. Commissioner (1952), 19 T.C. No. 29, CCH Dec. 19,289	7, 8
Culbertson v. Commissioner, 337 U.S. 733	5, 6, 7
Culbertson v. Commissioner, 194 F. (2d) 581	7
Levin v. Commissioner, 199 F. (2d) 692	5, 6, 7, 8
Levin v. Commissioner, 201 F. (2d) 365	7
Lusthaus case, 327 U.S. 293	6
Marcus v. Commissioner (1953), 201 F. (2d) 850	7
Seabrook v. Commissioner, 196 F. (2d) 332	7
Tower case, 327 U.S. 280	6
Western Pac. R. R. Corp. v. Western Pac. Ry. Co. (9th Cir. 1952), 197 F. (2d) 994	9, 10

Statutes	
Internal Revenue Code, Secs. 22(a), 181, 182(c), 3797(a)(2)	2
26 U.S.C. Sec. 1141(a)	2
28 U.S.C. 46(c)	2, 3, 9, 10
28 U.S.C. Sec. 1254(1)	2

Texts	
5 Stanford Law Review 332, 335	9

Regulations	
Treasury Regulations 111, Sec. 29.22(a)-1	2

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1952

No.

ESTATE OF MABEL COCHRAN, Deceased; SIDNEY ELMER COCHRAN and DONALD ROBERT COCHRAN, Executors, and JOSEPH E. COCHRAN,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Estate of Mabel Cochran, deceased, Sidney Elmer Cochran and Donald Robert Cochran, Executors, and

(NOTE): Emphasis is supplied unless otherwise noted.

Joseph E. Cochran, petitioners, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered November 12, 1952, and also to review the order of March 3, 1953, in which the division of that Court which heard the case denied leave to file proffered petitions to vacate an order denying a rehearing *in banc* and to reinstate the petition for rehearing *in banc*.

OPINIONS BELOW.

The opinion of the Tax Court of the United States (R. 187) is reported in 10 T.C.M. 675, CCH Dec. 18, 458(M). The opinion of the Court of Appeals is reported in 201 F. (2d) 365, and the opinion of the Court on petition for rehearing, a dissenting opinion, is also reported in 201 F. (2d) 365.

JURISDICTION.

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1) and 26 U.S.C. Sec. 1141(a).

STATUTES INVOLVED.

The pertinent provisions of Internal Revenue Code, Sec. 22(a), 181, 182(c), 3797(a)(2), Treasury Regulations 111, Sec. 29.22(a)-1, and 28 U.S.C., Sec. 46(c) are printed in an appendix hereto.

QUESTIONS PRESENTED.

1. To establish validity for income taxes of a pre-1951 family partnership is it necessary for members who have substantial investments of income-producing capital in the business to prove that their capital did not result from gifts from their parents and that they performed services for and participated in the management of the business?

2. May a litigant petition a Court of Appeals for a rehearing *in banc* under 28 U.S.C., Sec. 46(c) after a decision by a three judge division; or may such division prevent the petition from being considered by the Court of seven judges, treating it as an ordinary petition for rehearing absent the request for *in banc* consideration, thus refusing it the stature of a petition for a rehearing *in banc?*

STATEMENT.

In 1937, entirely without sophistication, two unrelated families formed a partnership to do an automobile dealer business in Oakland, California. (R. 189.) The business required substantial capital which was invested in the aggregate in almost equal amounts by the two families. (R. 60.) The only issue before the Court involves the partnership income tax validity in 1942, 1943 and 1944 of the investments of two adult daughter members of the Cochran family, Bernice Cochran (Johnson) and Winifred Cochran (Irwin); respondent did not question the senior

Cochran, his wife, and three adult sons; respondent also did not question the senior Celli, his wife, and their two adult sons.

The capital invested in the business by the Cochran children was in equal amounts and came in exactly the same way by gifts from the parents and was at all times substantial. (R. 60.) The Cochran daughters were treated the same as their brothers because their father believed he was obligated to give them what he gave his sons. (R. 189.) The daughters did not render any services to the business and did not receive any salaries. (Mabel Cochran and Anna Celli, the mothers, also did not render any services.) All of the other partners rendered managerial services and received salaries. (R. 60, 190.) The partnership agreement permitted its dissolution by the daughters or any other partner on notice or at the end of any year and liquidation of their investments (capital and surplus) to them. (R. 36, 37, 38.) In the years involved herein (1942, 1943 and 1944) particularly, the two Cochran daughters made regular withdrawals for their personal use from their capital accounts. (R. 191, 192.)

Respondent determined income tax deficiences against petitioners (Joseph and Mabel Cochran) in their 1942, 1943 and 1944 income by including the distributive income of the partnership attributed to the partnership interests of the daughters. On appeal the Tax Court decided that respondent did not err: because the evidence failed to show the existence of any business purpose for bringing the two daughters

in the partnership or that there was any intent (bona fide) to include the daughters as partners in the business (R. 192), other than to treat the daughters the same as their brothers; because the daughters did not render any services and their investments originated as gifts from their parents.

On review the Court of Appeals affirmed *per curiam* "for the reasons given in the opinion of the Tax Court." (201 F. (2d) 365.) The dissenting opinion by Judge Pope followed the holding in the Second Circuit in *Levin v. Commissioner,* 199 F. (2d) 692, wherein the case was remanded to the Tax Court for redetermination free of the erroneous concept that pre-1951 family partnerships, for validity, require participation in management or rendition of services and contribution of non-gift capital.

REASONS FOR GRANTING WRIT.

The decision of the Court below failed to accept the decision in *Culbertson v. Commissioner,* 337 U.S. 733, and is in conflict with decisions of the Second Circuit and Fifth Circuit and further fails to take cognizance of the recently changed position of the Tax Court, a consideration to which petitioners are entitled since the decision of the Tax Court below is not yet final.

The Court below has also failed to accept and follow the proper practice in its judicial proceedings calling for the exercise of this Court's power of supervision.

I.

THE DECISION BELOW FAILS TO FULLY ACCEPT THE DECISION IN CULBERTSON v. COMMISSIONER, IS IN CONFLICT WITH THE SECOND AND FIFTH CIRCUITS, AND IS CONTRARY TO THE PRESENT POSITION OF THE TAX COURT.

The decision of the Tax Court below was entered July 16, 1951. In *Culbertson v. Commissioner,* supra, this Court decided that the validity of a family partnership was not *ipso facto* defeated because the contribution of capital was made by the donee of a intrafamily gift or that a donee of an intrafamily gift could not be a partner without rendering services; and that this concept was not authorized by *Tower,* 327 U.S. 280, and *Lusthaus,* 327 U.S. 293.

In *Levin v. Commissioner,* supra, decided November 12, 1952, the Second Circuit remanded the case to the Tax Court for further findings in respect to a son, who was refused recognition as a partner as compared with his mother and sister, because the Tax Court's finding of an absence of intent to make the son a partner was the result of an erroneous legal concept that his investment of gift capital alone (he rendered no services) was insufficient in "that active participation in the business must necessarily have been shown to establish the partnership status of the son." The Court decided that without that concept it was reasonable that a contrary finding would have been made. And the Court was correct. On remand November 28, 1952, the Tax Court promptly changed its findings and decision (December 17, 1952) and held the son

to be a partner (CCH Dec. 19,356(M)) pursuant to the recent changed position previously taken by the Tax Court in *Clarence B. Ford v. Commissioner* (November 12, 1952) 19 T.C. No. 29, CCH Dec. 19,289.

It is a coincidence that on the same day November 12, 1952, the Court below herein affirmed *per curiam* the Tax Court below, the Second Circuit decided *Levin v. Commissioner,* supra, and the Tax Court changed its position per *Clarence B. Ford v. Commissioner,* supra.

The Fifth Circuit recently indicated in *Marcus v. Commissioner,* Feb. 18, 1953, 201 F. (2d) 850, another of the reversals of the Tax Court by the Fifth Circuit, that it was perhaps the last in view of *Clarence B. Ford,* supra, in a long line of family partnerships cases in which the Tax Court incorrectly redetermined deficiencies, which would have to be dealt with by the Fifth Circuit. (See *Culbertson v. Commissioner,* after remand, 194 F. (2d) 581, and *Seabrook v. Commissioner,* 196 F. (2d) 332.) This conclusion by the Fifth Circuit is also supported by the change in position by the Tax Court in *Levin v. Commissioner,* after remand.

It is submitted that the decision of the Tax Court below contains the same defect found by the Second Circuit in the decision of the Tax Court in *Levin v. Commissioner.* (See dissenting opinion herein of Judge Pope, 201 F. (2d) 365, 366.) The Tax Court below, after referring to the fact that the two daugh-

ters during the years in question each withdrew for their own personal use profits from the business, said as follows:

> "On the other hand the evidence also showed that neither of them performed any services for the new partnership and their testimony failed to establish the fact that they had any voice in the management and control of the business. Furthermore, their investments of capital in the business did not originate with them but with their parents."

This language shows that the Tax Court assumed as a matter of law that the failure of the daughters to perform services and that their investments of capital resulted from gifts from their parents, destroyed the reality of the partnership so far as the daughters were concerned.

In view of the present state of the law on this subject by virtue of the decision of the Second Circuit in *Levin v. Commissioner,* supra, and the decision of the Tax Court in *Clarence B. Ford,* supra, and in *Levin v. Commissioner* after remand, this Court should grant this petition for certiorari.

II.

IT WAS ERROR TO DENY PETITIONERS THE RIGHT TO PETITION FOR A REHEARING IN BANC.

Petitioners duly filed a petition "for a rehearing and a reconsideration herein *in banc.*" The three

judge division which heard the case considered the petition as an ordinary petition for rehearing and it was denied, Judge Pope dissenting. Thereafter petitioners delivered to the clerk of the Court petitions to vacate the order denying the petition for a rehearing *in banc* and for leave to reinstate the petition for rehearing *in banc* since the request that the petition for a rehearing be considered *in banc* was not brought to the attention of the other active judges of the circuit to allow determination by a majority whether there should be a rehearing *in banc*. The same division denied leave to file said petitions.

The statute and practice.

The statute, 28 U.S.C., Section 46(c) provides for a rehearing *in banc* as well as a hearing *in banc*. In *Western Pac. R. R. Corp. v. Western Pac. Ry. Co.* (9th Cir. 1952) 197 F. (2d) 994, followed in *Bridges, et al. v. U. S.* (9th Cir. 1952) 201 F. (2d) 254, the Ninth Circuit decided that a litigant's petition for a rehearing *in banc* will be treated as an ordinary petition for a rehearing; that a litigant has no right to invoke the power of a majority of the circuit judges to determine whether a case is a proper one for determination *in banc*.

The United States Court of Appeals for the District of Columbia follows a practice and has rendered decisions which are in conflict with the decision of the Ninth Circuit. See Chief Judge Denman's dissenting opinion in *Western Pac. R. R. Corp. v. Western Pac. Ry. Co.*, supra, p. 1020, and 5 Stanford Law Review

332, 335 (in which the *Western Pac. R. R. Corp.* decision is commented upon).

It is submitted that since the statute provides for rehearing *in banc* and since rehearings *in banc* can be ordered only by a majority of the judges of the Ninth Circuit, a litigant must have the right to have his request presented in some reasonable way to all judges for consideration and action. Since there is no express rule authorizing petitions by litigants for a rehearing *in banc,* it is submitted that this Court or the Court below should provide a procedure for invoking the authority provided by 28 U.S.C., Section 46(c).

CONCLUSION.

It is respectfully submitted that this petition for certiorari be granted.

Dated, San Francisco, California,
April 10, 1953.

ELI FREED,
Attorney for Petitioners.

(Appendix Follows.)

Appendix

STATUTES INVOLVED.

1. Internal Revenue Code, Section 22. Gross Income.

(a) General Definition.—"Gross income" includes gains, profits and income derived from salaries, wages, or compensation for personal service * * *, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever.

2. Internal Revenue Code, Section 181. Partnership Not Taxable.

Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity.

3. Internal Revenue Code, Section 182. Tax of Partners.

In computing the net income of each partner, he shall include, whether or not distribution is made to him——

* * * * * * *

(c) His distributive share of the ordinary net income or the ordinary net loss of the partnership, computed as provided in section 183 (b).

4. Internal Revenue Code, Section 3797. Definitions.

(a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof——

* * * * * * *

(2) Partnership and Partner.—The term "partnership" includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this title, a trust or estate or a corporation; and the term "partner" includes a member in such a syndicate, group, pool, joint venture, or organization.

* * * * * * *

5. Treasury Regulations 111.

Sec. 29.22(a)-1. What included in gross income.—Gross income includes a general compensation for personal and professional services, business income, profits from sales of and dealings in property, interest, rent, dividends, and gains, profits, and income derived from any source whatever, unless exempt from tax by law. (See sections 22(b) and 116.) In general, income is the gain derived from capital, from labor, or from both combined, * * *.

6. Title 28 U.S.C., Section 46(c).

Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the

court in banc is ordered by a majority of the circuit judges of the circuit who are in active service. A court in banc shall consist of all active circuit judges of the circuit.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statute involved	2
Statement	4
Argument	11
Conclusion	15

CITATIONS

Cases:	
Banks Warehouses, Inc. v. *Watt*, 345 U. S. 932	14
Bradley Mining Co. v. *Boice*, 345 U. S. 932	15
Commissioner v. *Culbertson*, 337 U. S. 733	11, 12, 13
Commissioner v. *Tower*, 327 U. S. 280	11, 14
Ford v. *Commissioner*, 19 T. C. No. 29	12
Levin v. *Commissioner*, 199 F. 2d 692	12
Lucas v. *Earl*, 281 U. S. 111	11
Lusthaus v. *Commissioner*, 327 U. S. 293	11
Marcus v. *Commissioner*, 201 F. 2d 850	12
United States v. *Gypsum Co.*, 333 U. S. 364	13–14
Western Pacific Railroad Corp. v. *Western Pacific Railroad Co.*, 197 F. 2d 994, 345 U. S. 247	14
Statute:	
Current Tax Payment Act of 1943, c. 120, 57 Stat. 126, Sec. 6	5
Internal Revenue Code:	
Sec. 22 (26 U. S. C. 1946 ed. 22)	2
Sec. 181 (26 U. S. C. 1946 ed. 181)	3, 13
Sec. 182 (26 U. S. C. 1946 ed. 182)	3, 13
Sec. 3797 (26 U. S. C. 1946 ed. 3797)	3, 13
28 U. S. C. 46	4, 14
Miscellaneous:	
Federal Rules of Civil Procedure, Rule 52	14

256014—53——1

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 734

ESTATE OF MABEL COCHRAN, DECEASED; SIDNEY ELMER COCHRAN AND DONALD ROBERT COCHRAN, EXECUTORS, AND JOSEPH E. COCHRAN, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The *per curiam* opinion of the Court of Appeals (R. 212) is reported at 201 F. 2d 365. A dissenting opinion filed by Judge Pope (R. 230–234) in connection with the denial by the Court of Appeals of a petition for rehearing is reported at 201 F. 2d 365. The memorandum findings of fact and opinion of the Tax Court (R. 186–193) are not reported.

JURISDICTION

The judgment of the Court of Appeals (R. 213) was entered November 12, 1952. A timely petition for rehearing (R. 215–227) was denied by the Court of Appeals on January 23, 1953 (R. 229). The petition for a writ of certiorari was filed on April 20, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in affirming the finding of the Tax Court that in the taxable years involved the two daughters of the taxpayer were not bona fide partners with him for federal income tax purposes.

2. Whether the Court of Appeals erred in acting through the division of three judges who originally heard the case in denying a petition for rehearing *en banc*.

STATUTE INVOLVED

Internal Revenue Code:

> SEC. 22. GROSS INCOME.
>
> (a) [As amended by Sec. 1, Public Salary Tax Act of 1939, c. 59, 53 Stat. 574] *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service (including personal service as an officer or employee of a State, or any political subdivision thereof, or any agency or instrumentality of any one or more of the foregoing), of whatever kind

and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever.

* * * * *

(26 U. S. C. 1946 ed. 22.)

SEC. 181. PARTNERSHIP NOT TAXABLE.

Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity.

(26 U. S. C. 1946 ed. 181.)

SEC. 182. TAX OF PARTNERS.

In computing the net income of each partner, he shall include, whether or not distribution is made to him—

* * * * *

(c) His distributive share of the ordinary net income or the ordinary net loss of the partnership, computed as provided in section 183 (b).

(26 U. S. C. 1946 ed. 182.)

SEC. 3797. DEFINITIONS.

(a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof—

* * * * *

(2) *Partnership and Partner.*—The term "partnership" includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this title, a trust or estate or a corporation; and the term "partner" includes a member in such a syndicate, group, pool, joint venture, or organization.

* * * * *

(26 U. S. C. 1946 ed. 3797.)

Judicial Code:

SEC. 46. Assignment of judges; divisions; hearings; quorum.

* * * * *

(c) Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in active service. A court in banc shall consist of all active circuit judges of the circuit.

(28 U. S. C. 46 (c).)

STATEMENT

This proceeding involves deficiencies in federal income taxes asserted against Joseph E. Cochran (herein sometimes referred to as the taxpayer)

and the estate of his deceased wife, Mabel Cochran,[1] for the taxable years 1943 and 1944.[2]

For a number of years prior to December 31, 1937, the taxpayer and Bernardo Celli, Sr., owned and operated, as partners, a Chevrolet automobile dealership in Oakland, California, under the firm name of Cochran & Celli. On that date the taxpayer and his wife had four children, Bernice and Winifred (both since married), and Sidney E. Cochran, all of whom were adults, and Donald Robert Cochran, then 17 years of age. Bernardo Celli, Sr., and his wife, Anna, had two sons, Bernardo, Jr., and Lloyd, both of whom were adults. In 1937 the two Celli sons and Sidney Cochran, the adult Cochran son, were employed in the partnership business. (R. 19, 188.)

In order to perpetuate the Chevrolet franchise in their families and to interest their sons in the business, the two partners decided in 1937 to take their sons into the business as partners (R. 189).

On December 31, 1937, the opening credit accounts of the taxpayer and Bernardo Celli, Sr.,

---

[1] The date of death is not shown by the record, but it was subsequent to the taxable years involved. Deficiencies were asserted against her estate on the basis of her community interest in the income for the years involved, for which she filed separate income tax returns (R. 22–23, 188).

[2] Computation of the deficiencies for 1943 also involves the income of the taxpayer and his deceased wife for the year 1942 by reason of the tax forgiveness provisions of Section 6 of the Current Tax Payment Act of 1943, c. 120, 57 Stat. 126.

on the books of the Cochran & Celli partnership were $242,914.94 and $237,605.44, respectively. As of that date journal entries were made on the partnership books transferring $100,617.43 from the investment account of the taxpayer to a new investment account set up in the name of Mabel Cochran and transferring $102,024.88 from the investment account of Bernardo Celli, Sr., to a new investment set up in the name of Anna Celli. As of the same date other entries were made transferring amounts from the accounts of each of the four parents to accounts set up in the name of each of their respective adult children. (R. 19.) [3]

The above withdrawals from the taxpayer's investment account, the credits to his wife's new investment account, and the crediting of new investment accounts of the Cochran daughters, all were component parts of a single plan to make all members of the Cochran family partners in the business (R. 190).[4]

---

[3] Attached as Exhibits 1 through 6 to the stipulation of facts (R. 19–20, 24–29) are excerpts from the investment accounts in the names of the taxpayer, his wife, and their four children on the books of the partnership showing the transfers from one investment account to another during the period from December 31, 1937, through December 31, 1944.

[4] The Tax Court found from the evidence (R. 190) that the withdrawals from the taxpayer's investment account, the credits to his wife's new investment account, the crediting of new investment accounts of the Cochran daughters, and their signing of the new partnership agreement, all took place within the months of November and December 1937.

The partnership agreement of January 1, 1938 (R. 29–43), is comprehensive in its terms. It recites the ownership by the contracting parties of the business theretofore conducted under the firm name and style of Cochran & Celli, provides that the new partnership should continue to conduct the business under the same firm name, assuming all valid obligations, liabilities, or contracts of the business theretofore owned and conducted by the taxpayer and Bernardo Celli, Sr., and sets forth the respective contribution and interest in the business of the several signatories thereto. Among the more important provisions of the agreement of January 1, 1938, are paragraph 4 (R. 31), providing for inclusion of Donald Robert Cochran as a partner upon his attaining legal age; paragraph 5 (R. 31–32), giving to the taxpayer and Bernardo Celli, Sr., as "Managers," absolute and unqualified control of all phases of the partnership business; and paragraph 9 (R. 35), providing for perpetuation of this joint control of the business by members of the two families in the event of the death of either manager by designating as his successor "Manager" the oldest surviving male partner of the deceased manager's family. The agreement was to continue for one year, and on a year-to-year basis thereafter unless some partner gave written notice, in advance, of his desire to dissolve the partnership (Par. 12, R. 36.) Paragraph 24 (R. 42),

services to the business. In 1942, 1943 and 1944 both daughters made regular withdrawals of money from the accumulated profits of the partnership credited to their accounts.

There was no bona fide intent on the part of the copartners of Cochran & Celli and the two Cochran daughters, Bernice and Winifred, either when the partnership was formed or at any other time during the taxable years 1942, 1943 and 1944, that the two Cochran daughters were to be joined with members of the existing partnership of Cochran & Celli for the purpose of carrying on business as a partnership. Bernice Cochran Johnson and Winifred Cochran Irwin were not valid partners for income tax purposes in the business of Cochran & Celli during the years 1942, 1943 and 1944.

The taxpayer, his wife, and their two daughters filed separate individual income tax returns for the years here involved in which they reported in gross income their distributive shares of the partnership income of Cochran & Celli. In determining the deficiencies in tax here involved the Commissioner added to the income reported by the taxpayer and his wife (as community income) the amounts reported by their two daughters as partnership income. (R. 188.)[5]

---

[5] Copies of the deficiency notices were attached as exhibits to the petitions filed with the Tax Court (R. 7–8, 10, 12, 14), but are not included in the printed record.

The Tax Court sustained the Commissioner's determination of deficiencies (R. 186–194), and its decision was affirmed by the Court of Appeals (R. 212). Petitioners thereafter filed a timely petition for rehearing *en banc* (R. 215–227), which with Judge Pope dissenting was denied by the division which heard the case originally (R. 229–234). After this petition was denied petitioners filed a document (R. 235–243), entitled "Petition to Vacate Order Denying Petition for Rehearing *in Banc* and Petition for Leave to Reinstate Petition for Rehearing *in Banc*," leave to file which was denied by the same division (R. 245).

ARGUMENT

1. This is another case involving the taxation of income of so-called family partnerships, of which a great many have been passed upon by the courts in recent years. The principles governing the determination of such cases have been fully explored by this Court in *Commissioner* v. *Tower,* 327 U. S. 280, *Lusthaus* v. *Commissioner,* 327 U. S. 293, and *Commissioner* v. *Culbertson,* 337 U. S. 733.

It also is settled by the above decisions and the decisions of this Court, beginning with *Lucas* v. *Earl,* 281 U. S. 111, on which they are based, that the income of a business purportedly conducted as a family partnership is taxable to him who earns it. Furthermore, the determination of this question depends in each instance upon "inquiries into the subjective," *i. e.,* the intent of

the parties in the particular case. *Commissioner* v. *Culbertson, supra,* at p. 743. A reading of the opinions of the various courts of appeals in the cases claimed to be in conflict (*Levin* v. *Commissioner,* 199 F. 2d 692 (C. A. 2); *Marcus* v. *Commissioner,* 201 F. 2d 850 (C. A. 5)), and in the Ninth Circuit does not disclose any disagreement as to the appropriate legal criteria which are to be applied in cases of this character.

Finally, contrary to counsel's suggestion (Pet. 7), we find nothing in the Tax Court's opinion in *Ford* v. *Commissioner,* 19 T. C. No. 29), to indicate that the Tax Court would now reach a different conclusion in the instant case. The Tax Court's decision in the *Ford* case, rather than indicating a "changed" position as assumed by counsel (Pet. 7), seems to be in accordance with earlier Tax Court decisions involving substantially similar facts. Nor do we find anything in the record in the instant case which would require a reversal of the Tax Court's decision. The controlling consideration in these cases, as this Court said in *Commissioner* v. *Culbertson, supra,* p. 742, is whether "the parties in good faith and acting with a business purpose intended to join together in the present conduct of the enterprise." In this case the Tax Court found as a fact, among other things, that "The two Cochran daughters were included because their father felt morally obligated to give them as much as he gave

his sons" (R. 189). In its opinion the Tax Court added (R. 192):

> Petitioner Joseph E. Cochran testified that the reason he made his daughters partners in the business was to afford them treatment equal to that he had shown his sons. While his motive was commendable, the fact remains the evidence fails to show the existence of any business purpose for bringing either of the two daughters into the partnership or that there was a bona fide intent that the two daughters be joined as partners in the business in question.

The foregoing statements are supported, not only by the record as a whole, but by the testimony of the taxpayer himself (R. 94–126). When the evidence is considered in the light of the purpose of Congress, as expressed in Sections 181, 182, and 3797 (a) (2) of the Internal Revenue Code, *supra,* to tax the earnings of partnerships to the individual members thereof, it cannot be said that the findings of the Tax Court in this case are "clearly erroneous." *United States* v. *Gypsum Co.,* 333 U. S. 364, 395–396; Rule 52 (a), Federal Rules of Civil Procedure. However, "Whether the evidence would have supported a different finding by the Tax Court is a question not here presented." *Commissioner* v. *Tower, supra,* p. 292.

2. Petitioner's argument that the denial of its motion for a rehearing *en banc* was improper

because the denial was made by the division that heard the appeal rather than the full court, is fully answered by the decision of this Court in *Western Pacific Railroad Corp.* v. *Western Pacific Railroad Co.*, 345 U. S. 247. There it is made clear that 28 U. S. C. 46 (c), *supra*, p. 4, does not require any consideration of an individual motion for rehearing *en banc* by the entire court if the court has delegated that function to the divisions. 345 U. S. at 259. Moreover, the situation in this case is distinguishable from that in *Western Pacific*, where the case was remanded, for here the division of the court involved must have acted on the motion on its merits pursuant to the Statement of the Court of Appeals for the Ninth Circuit in the *Western Pacific* case that such would be the practice in the future. *Western Pacific Railroad Corp.* v. *Western Pacific Railroad Co.*, 197 F. 2d 994, 1016.[6] This, therefore, is not a situation where neither the court as a whole nor one of its divisions passed on the motion. This Court has, however, remanded another case to the Court of Appeals for the Ninth Circuit on facts which

[6] In this respect the case differs from *Banks Warehouses, Inc.* v. *Watt*, 345 U. S. 932, where on the authority of the *Western Pacific* case, this Court granted certiorari, vacated the order denying rehearing *en banc*, and remanded the case to the Court of Appeals for Ninth Circuit. There the denial preceded the statement of policy by the Court of Appeals and may have been subject to the same infirmity, that it was not clear whether the division exercised its discretion or acted in the belief that it lacked power.

appear similar to those here involved. *Bradley Mining Co.* v. *Boice,* 345 U. S. 932. Since the action was taken *per curiam,* it is not possible for us to determine the extent to which that case is applicable here. Apart from that, however, there would seem to be no need for remand in this case.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT L. STERN,
Acting Solicitor General.
H. BRIAN HOLLAND,
Assistant Attorney General.
ELLIS N. SLACK,
FRED E. YOUNGMAN,
Special Assistants to the Attorney General.

MAY 1953.

U. S. GOVERNMENT PRINTING OFFICE: 1953